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REMARKS

Applicant has carefully studied the nonfinal Examiner's Action mailed March 29, 2007. The amendment appearing above and these explanatory remarks are believed to be fully responsive to the Action. Accordingly, this important patent application is now believed to be in condition for allowance.

*Claim Rejections - 35 U.S.C. § 103*

Claims 17 and 18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Van Emelen et al.* (U.S. Patent Application Publication No. U.S. 2005/0096468) in view of *Jolivet et al.* (U.S. Patent No. 6,645,972). Applicant respectfully traverses the rejection, however, as the Office has not established a *prima facie* case of obviousness.

The date of priority for this invention is September 19, 2002. *Van Emelen et al.* is a U.S. Patent Application Publication with a publication date of May 5, 2005 and a PCT filing date of March 11, 2003. Therefore, *Van Emelen et al.* has an effective date of May 5, 2005 for rejections under 35 U.S.C. §102(a) and/or §102(b). The Office cites the Provisional Application date for *Van Emelen et al.*, March 13, 2002, which indicates the Office regards the reference as prior art under §102(e). To qualify as a reference under §102(e) the subject matter used in the rejection must be disclosed in the underlying provisional application in compliance with 35 U.S.C. §112, first paragraph. (MPEP §706.02(f)(1)). The Office has not provided the underlying provisional application to Applicant for review as required by MPEP 707.05(e)(III)<sup>1</sup>. The Office cannot make a *prima facie* case of obviousness without showing that the underlying provisional application disclosed the material relied upon in the rejection in compliance with 35 U.S.C. §112, first paragraph. Without such a showing, *Van Emelen et al.* is only entitled to an effective reference date as of its PCT filing date of March 11, 2003, which does not predate Applicant's priority date.

Similarly, *Jolivet et al.* is only entitled to an effective reference date as of the filing date of the nonprovisional application, as the Office has not made a showing that the subject matter used in the rejection must be disclosed in the underlying provisional application in compliance

<sup>1</sup> Withdrawn U.S. Patents and patent application publications are considered "non-patent documents" and are to be supplied by the Office.

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with 35 U.S.C. §112, first paragraph. Therefore, until the Office provides Applicant with the underlying Provisional Application, *Jolivet et al.* does not constitute prior art as its filing date, November 4, 2002, does not predate Applicant's priority date.

**Conclusion**

Entry of a Notice of Allowance is solicited. If the Office is not fully persuaded as to the merits of Applicant's position, or if an Examiner's Amendment would place the pending claims in condition for allowance, a telephone call to the undersigned at (813) 925-8505 is requested.

Very respectfully,

SMITH & HOPEN

By: 

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Dated: August 21, 2007

**CERTIFICATE OF FACSIMILE TRANSMISSION**

(37 C.F.R. 1.8 (a))

I HEREBY CERTIFY that this correspondence is being transmitted by facsimile to the United States Patent and Trademark Office, Art Unit 1614, Attn: Donna A. Jagoe, (571) 273-8300 on August 21, 2007.

Dated: August 21, 2007



Lauren Reeves